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IN THE

Supreme Court of the United States

October Term, 1954

HONORABLE MICHAEL L. IGOE, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, *Petitioner*

v.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Honorable Michael L. Igoe, Judge of the United States District Court for the Northern District of Illinois, Eastern Division, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, which ordered that a writ of mandamus issue directing the petitioner (1) to vacate his order of July 2, 1954 denying defendant's motion for a change of venue in the case of *Claudine M. Mikesell* v. *Chicago, Rock Island and Pacific Railroad Company*, No. 52 C 2124, and (2) to enter an order transferring said cause to the Southern District of Iowa.

OPINIONS BELOW

The first opinion of the Court of Appeals in these proceedings (App. 17a) remanding the cause with directions

to the petitioner to vacate his original order of June 30, 1953, denying defendant's motion to transfer, and to reconsider the motion in the light of the views expressed by the Court of Appeals, is reported at 212 F. (2d) 378. Petitioner's memorandum opinion (App. 32a) denying the motion to transfer after further consideration in accordance with the mandate of the Court of Appeals, is not reported. The opinion of the Court of Appeals, filed February 16, 1955 (App. 34a) pursuant to which the writ of mandamus was ordered to issue vacating petitioner's order of July 2, 1954, and directing that the cause be transferred, is not yet reported.

JURISDICTION

The judgment of the Court of Appeals vacating petitioner's second order denying transfer, and ordering that the cause be transferred, was entered on February 16, 1955. The Court of Appeals has stayed its judgment pending the decision of this Court. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTION PRESENTED

Whether on petition for a writ of mandamus a Court of Appeals may review an order of a district court denying a motion for transfer under 28 U.S.C. 1404(a), and issue a writ of mandamus directing the district court to transfer the action to a district court in another Circuit, where the Court of Appeals concludes that the district court, although applying the proper legal standards, has "abused its discretion" by arriving on conflicting facts at a judgment which the Court of Appe[illegible] deems "clearly erroneous."[1] Among the included inquiries is the question of whether mandamus is ever an available remedy to

[1] If certiorari is granted, the petitioners will also seek to demonstrate that on the facts the district court's denial of transfer was not an "abuse of discretion," however minimal a definition that phrase may be given. *McAllister* v. *United States*, 348 U.S. 19, 20-21.

correct an alleged "abuse of discretion" by the district court in denying a transfer and retaining valid jurisdiction in the forum selected by the plaintiff.

STATUTES INVOLVED

The case involves a motion for change of venue under 28 U. S. C. 1404 (a) (Act of June 25, 1948, 62 Stat. 937):

> § 1404. Change of Venue.
>
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The pertinent provisions of 28 U. S. C. 1651 (a)—the All Writs Statute (Act of June 25, 1948, 62 Stat. 933, amended by Act of May 24, 1949, 63 Stat. 102)—reads:

> § 1651. Writs.
>
> (a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U. S. C. § 1291 (Act of June 25, 1948, 62 Stat. 929) provides in part:

> § 1291. Final Decisions of District Courts.
>
> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *

STATEMENT

On September 13, 1952, Claudine M. Mikesell, Administratrix of the Estate of Charles Delbert Mikesell, filed an action in the Superior Court of Cook County, Illinois,

against the Chicago, Rock Island and Pacific Railroad Company, asking judgment of $100,000 for the wrongful death of her husband in a railroad crossing accident at Avoca, Iowa. (App. 17a). On October 6, 1952, the defendant railroad removed the action to the United States District Court for the Northern District of Illinois, Eastern Division, Seventh Circuit, sitting in Chicago, Illinois, on the ground of diversity of citizenship, it then appearing that the defendant was a Delaware corporation and the plaintiff a resident of Iowa. On October 10, 1952, the defendant railroad filed a motion under 28 U. S. C. 1404 (a) to transfer the action to either the Central Division (Des Moines) or the Western Division (Council Bluffs) of the United States District Court for the Southern District of Iowa, in the Eighth Circuit. (App. 1a). The motion was supported by an affidavit alleging, *inter alia*, that the accident occurred in the District to which transfer was sought, that defendant's witnesses resided at Avoca or Des Moines in that District and eight of them were non-employees not subject to process in the Northern District of Illinois, that the rail distances from Des Moines and Avoca to Chicago were such that the loss of time and expense involved in transporting witnesses would be substantial, and that trial in Chicago would be excessively costly to defendant. (App. 3a). The plaintiff filed objections to the transfer, alleging, *inter alia*, that defendant's principal place of business was in Chicago; that, if transferred, the case would not be heard at Avoca, the scene of the accident and alleged location of the witnesses, but rather at Des Moines or Council Bluffs, and that the rail service between Avoca, Council Bluffs, Des Moines, and Chicago, was such as to give little if any advantage to either of the proposed transferee Divisions over Chicago so far as the convenience of parties or witnesses was concerned; that Des Moines is an insurance center in which plaintiff would not obtain trial in

an impartial atmosphere; and that she is a widow of moderate means, and the expense and inconvenience of hiring an attorney and prosecuting her claim in Iowa would impose a real burden and hardship upon her. (App. 7a) On June 30, 1953, Judge Igoe denied the motion to transfer. (App. 16a).

On August 4, 1953, defendant railroad applied to the Court of Appeals for a writ of mandamus directing Judge Igoe to vacate his order denying transfer, and to enter an order transferring the cause to the Southern District of Iowa. (App. 17a). Attorneys for the plaintiff, acting for Judge Igoe, opposed the petition on the ground, among others, that mandamus was not available to review the action of a District Court denying a motion to transfer.

The Court of Appeals on April 20, 1954, recognizing the conflict among the circuits on the question as to whether or not mandamus would lie, held that it possessed jurisdiction "to review orders relative to transfer under Section 1404 (a) by way of mandamus." The writ was not awarded, but the cause was remanded to the District Court to determine the motion in the light of the standards of the statute as interpreted by the Court of Appeals. The Court of Appeals specifically pointed out that "ultimate decision . . . is within the province of the District Court, and we cannot, as petitioner would have us do, usurp its function and decide the question in this court." (App. 17a)

On remand the plaintiff filed an additional affidavit disclosing that on May 2, 1953, she had married M. L. Davis, an employee of a Chicago, Illinois business concern; that she had moved with her husband and two children to Lombard, Illinois, within the Northern District, where her children, who had been adopted by Mr. Davis, were enrolled in the public schools; that she and her husband had purchased a home, maintained a bank account, and were registered to vote in the District in which the suit was pend-

ing, and considered it their permanent residence. (App. 27a). Plaintiff also file dthe affidavit of William Davis, her brother-in-law, confirming these facts. (App. 30a).

Defendant railroad company made no further proffer in support of its motion.

On July 2, 1954, Judge Igoe filed a memorandum opinion stating that he had given further consideration to the motion to transfer, the pleadings, and the affidavits, and had "reached the conclusion that it would not be for the convenience of the parties and witnesses, nor in the interests of justice to transfer this case," (App. 33a) and an order denying the motion to transfer was thereupon entered. (App. 33a).

Notwithstanding that the Court of Appeals had in its first opinion held that ultimate decision on the defendant railroad's motion to transfer was within the province of the district court and would not be usurped by the Court of Appeals, the railroad company on August 7, 1954, filed a second petition identical with its original petition and seeking the same relief. Judge Igoe moved to dismiss on the ground that the same matter had already been adjudicated on the prior petition, and filed an answer in the alternative.

The second petition for the writ was argued twice before the Court of Appeals; on the second occasion before the first *en banc* Court convened in the long history of the Seventh Circuit.

On February 16, 1955, the Court of Appeals granted the writ, directing Judge Igoe to transfer the cause to the Southern District of Iowa, in the Eighth Circuit (App. 34a). Judge Finnegan filed a dissenting opinion (App. 42a).

The majority opinion concerned itself with the factual dispute as to which was the more convenient forum, including consideration of an assumed greater congestion of the

trial calendar of the Northern District of Illinois.[2] There was no suggestion that Judge Igoe had erred in any matter of law. The Court of Appeals adopted the view that a writ of mandamus would issue to compel the transfer where on an examination of the facts the appellate court concluded that the judgment with respect to the "balance" of convenience made on these facts by the District Court was not simply erroneous, but "so clearly erroneous as to amount to an abuse of discretion."

Judge Finnegan dissented on the ground that the Court of Appeals had merely substituted its discretion for that of the district court, where it was vested by statute. He stated that "the majority's opinion is not a demonstration of discretion abused below, but rather a sliding scale of judgment values between reviewing tribunal and trial court." Noting Judge Goodrich's comments[3] on the conflict between the purpose of Section 1404 (a) to make the business of the courts easier, quicker and less expensive, and the expense and delay that are attendant upon the interlocutory review of such orders by mandamus, Judge Finnegan concluded, "More slides into abdication today, than a mere order of transfer finally wrested from our court."

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[2] The median time interval between the filing and disposition of civil cases in the Northern District of Illinois during the fiscal year ending June 30, 1954 was 10.6 months. The same median time interval in civil cases tried in the Southern District of Iowa during the fiscal years 1953 and 1954, was 8.9 months—a difference of less than two months. *Annual Report of the Director of the Administrative Office of the United States Courts 1954*, Table C6, pp. 170-171.

[3] *All States Freight* v. *Modarelli*, 196 F. (2d) 1010, 1011, 1012 (C.A. 3).

REASONS FOR GRANTING THE WRIT

The effect of the decision below is to permit by writ of mandamus an interlocutory review on questions of both fact and law of a district court order on motion to transfer —an order which is admittedly non-appealable. Motions to transfer have become almost invariable routine in diversity cases in the federal courts. The potential burden thus imposed upon the appellate courts is reflected in the fact that during the fiscal year ending June 30, 1954, 324 civil cases were ordered transferred from one federal district court to another.[4] Denials of transfer presumably ran much higher.

The underlying personal injury action was commenced almost three years ago against the defendant railroad by the widow-administratrix in an Illinois state court having jurisdiction over the subject matter and parties. The case is not yet at issue. The delay has resulted entirely from two appellate reviews through mandamus proceedings of a non-appealable order denying transfer under 28 U.S.C. 1404 (a)—a statute intended to enhance the speed, efficiency and economy of litigation in the federal courts.

The decision of the Court of Appeals of the Seventh Circuit making the writ of mandamus available in the circumstances of this case presents a direct conflict with decisions in other Circuits upon an issue of procedural law of major importance in the administration of justice in the federal courts. This question has been twice reserved for later decision by this Court. The decision of the question below is clearly in conflict in principle with applicable decisions of this Court.

Conflict Among the Circuits

The court below directly decided that on petition for writ of mandamus under Section 1651 (a), a Court of Appeals may, and should, review the order of a district court deny-

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[4] *Annual Report of the Director of the Administrative Office of the United States Courts, 1954*, Table C4, p. 160.

ing a motion under Section 1404 (a) for transfer to a district court in another circuit, both to determine whether the district court has exercised a discretion legally vested in it by Section 1404 (a), and to determine whether the district court, although exercising the discretion legally vested in it in accordance with the statutory standards, has arrived at a judgment in balancing the factual considerations involved, which the Court of Appeals concludes on re-examination of these factual considerations to have been "clearly erroneous."

The holding of the Court below that the factual judgment reached by the District Court may and should be reviewed on petition for mandamus and the writ issued if the Court of Appeals concludes that the factual judgment of the district court is so "clearly erroneous" as to constitute an "abuse of discretion", is in direct conflict with decisions on the same question by the Courts of Appeal of the First and Third Circuits. *In re Josephson*, 218 F. (2d) 174, 182, 186 (C. A. 1);[5] *All States Freight, Inc.* v. *Modarelli*, 196 F. (2d) 1010, 1012 (C. A. 3).[6]

The result of the district court's denial of the motion to transfer was to retain the action within the Seventh Cir-

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[5] At page 182 of 218 F. (2d), Chief Judge Magruder stated: "As to the second of these contentions, that the order of transfer was an 'abuse of discretion' under the circumstances, we are clear that as a matter of general policy we ought not to go into that in the present (mandamus) proceeding." At page 186 of 218 F. (2d): "Accordingly, we serve notice that in the future, except in really extraordinary situations the nature of which we shall not undertake to formulate in advance, we shall stop such mandamus proceedings at the very threshold, by dening leave to file the petition for a writ of mandamus."

[6] At page 1012 of 196 F. (2d) Judge Goodrich, speaking for the Court *en banc*, stated: "We do not propose to grant such

cuit, and subject to ultimate appellate review by the Court of Appeals of that Circuit. The decision of the Court of Appeals that a petition for writ of mandamus to review the order denying transfer might be entertained under these circumstances conflicts in principle with decisions of the Courts of Appeal of the First and Eighth Circuits, which hold that 28 U. S. C. 1651 (a) confers the power to issue extraordinary writs only "in aid" of the appellate jurisdiction of a Court of Appeals, and that there is no power to issue such a writ except where the action of the district court may impair or defeat the actual or potential appellate jurisdiction of the Court of Appeals over the cause. *In re Josephson*, 218 F. 2d 174, 181 (C. A. 1);[7] *Carr* v. *Donohoe*, 201 F. (2d) 426, 428, 429 (C.A. 8).

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review where the judge in the district court has considered the interests stipulated in the statute and decided thereon.[3] Our policy was indicated in our decision in Gulf Research and Development Company v. Leahy which concerned a different section of the Code. The discussion there regarding the reason why caution should be exercised with regard to granting mandamus against a judge is fully applicable here.

"We realize that the view we express is not the one which some of our judicial brethren are following with regard to this statute. But we cannot escape the conclusion that it will be highly unfortunate if the result of an attempted procedural improvement is to subject parties to two lawsuits: first, prolonged litigation to determine the place where a case is to be tried; and second, the merits of the alleged cause of action itself.

"[3] We granted it once, not to review the exercise of a judge's discretion, but to indicate that the discretion should be exercised. *Paramount Pictures* v. *Rodney*, 3 Cir., 1951, 186 F. 2d 111."

[7] At page 181 of 218 F. (2d), Chief Judge Magruder stated: "If the district judge had held on to the case, i.e., had denied the motion for transfer, such action would have preserved, not frustrated, any potential appellate jurisdiction which we might have had; and we are at a loss to understand how we could properly review on mandamus an order denying a transfer, on the pretense that such a review would be in 'aid' of our appellate jurisdiction."

In *Carr* the Court of Appeals for the Eighth Circuit declined to permit the use of a petition for mandamus to review an order of a District Court transferring an action to another District within the Eighth Circuit. The Ninth Circuit would entertain a petition for mandamus in these circumstances, even though the District Court had declined to transfer, where it appeared that the District Court was without power as a matter of law to order the transfer sought. *Shapiro* v. *Bonanza Hotel Co. Inc.*, 185 F. (2d) 777 (C.A. 9). The Court of Appeals for the Second Circuit holds that it may issue a writ of mandamus "in aid" of the general federal appellate jurisdiction, but not to protect its appellate jurisdiction as distinguished from the appellate jurisdiction of another federal Court of Appeals. *Magnetic Engineering and Manufacturing Co.* v. *Dings Mfg. Co.*, 178 F. (2d) 866, 869 (C.A. 2). However, as the rule is now applied in the Second Circuit, an order granting a transfer to a District Court in another Circuit will be reviewed on mandamus if it is alleged that the District Court was without power to act so that its order would be a nullity; but if no more than an abuse of discretion is alleged a petition for mandamus will be entertained only if the transfer is denied and not if it is granted. In the latter case, application must be made to the Court of Appeals of the transferee circuit (which, if it were the Court of Appeals for the First or Third Circuit would, as we have seen, decline to entertain the petition). *Arrowhead Co., Inc.* v. *The Aimee Lykes, et al.*, 193 F. (2d) 83 (C.A. 2); *Anthony* v. *Kaufman*, 193 F. (2d) 85 (C. A. 2), certiorari denied, 342 U.S. 955.[8] Mandamus is available in the Court

[8] Judge Swann is of the view that a Court of Appeals lacks power to grant mandamus to review an order denying transfer under Section 1404(a). Dissent in *Ford Motor Co.* v. *Ryan*, 182 F. (2d) 329, 332 (C.A. 2) certiorari denied, 340 U.S. 851. Early decisions of the Court of Appeals for the Second Circuit are collected and discussed by the Honorable Irving R. Kaufman, *Observations on Transfers Under Section 1404 (a) of the New Judicial Code*, 10 F.R.D. 595, 595-598.

of Appeals for the District of Columbia to review an order directing transfer where that order is based upon an erroneous interpretation of the criteria established by the statute; but it is not clear whether the determination of the District Court on the facts would be reviewed, or whether mandamus would ever be available in this Circuit where the transfer is denied. *Wiren* v. *Laws*, 194 F. 2d 873 (C.A.D.C.), certiorari denied 346 U.S. 938. The same is true of the Fifth Circuit. *In re Atlantic Coast Line R. Co.*, 185 F. (2d) 766 (C.A. 5). In the Sixth Circuit petitions for mandamus have been entertained both where the transfer was granted below, and where it was denied; and that Court will examine the record for an "apparent" abuse of discretion below in evaluating conflicting factual considerations. *Sun Oil Co.* v. *Lederle*, 199 F. (2d) 423 (C. A. 6); *Nicol* v. *Koscinski*, 188 F. (2d) 537 (C. A. 6).

Litigants in identical situations are thus faced with a wide variety of possible results both as to the availability of mandamus and as to the scope of review on the petition, depending upon the circuit in which the case is pending.[9] Such a lack of uniformity in the law applied to various litigants in the federal courts is unseemly and unjust, and should be resolved by this Court. As we have seen, the course of proceedings below in the instant case was such that these basic conflicts would be necessarily resolved either directly or in principle in any review of the present case by this Court.

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[9] Moreover, there seems to be a lack of uniformity in the same circuit; for example, the Seventh Circuit, in a recent case involving a petition for mandamus against the same Judge Igoe, who had granted a stay of proceedings, said that if the reasoning of those who sought mandamus was applied, "then every interlocutory order which is wrong might be reviewed under the All Writs Act. The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction." *Radio Corporation of America* v. *Igoe*, 217 F. (2d) 218, 221.

Conflict With Decisions of This Court

This Court has twice reserved the question of whether mandamus is an appropriate remedy to review the decision of a district court on a motion for transfer under Section 1404 (a). *Norwood* v. *Kirkpatrick*, October Term 1954, decided April 11, 1955, 99 L. Ed. 461, 463; *Ex Parte Collett*, 337 U. S. 55, 72.

The decision below, and those with which it is in accord, that the writ will lie, conflict in principle with prior decisions of this Court.

The Courts of Appeal are authorized by the terms of the All Writs Statute (28 U.S.C. 1651 (a)) to issue writs of mandamus only "in aid of their respective jurisdiction," and since their jurisdiction is exclusively appellate they may issue the writ only in aid of that appellate jurisdiction. *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 25. The petitioner's order denying transfer imposed no bar or obstruction to ultimate appellate review by the court below, and it is difficult to conceive how its writ of mandamus directing that the cause be transferred to a district court in the Eighth Circuit could be "in aid" of the appellate jurisdiction of the Court of Appeals of the Seventh Circuit.

As we have noted, the consequence of the decision below is to permit interlocutory review by mandamus of a concededly non-appealable order. This result is contrary to the historic policy of Congress and of this Court to prevent piecemeal reviews of a single controversy, which can only result in "enfeebling judicial administration." *Cobbledick* v. *United States*, 309 U.S. 323, 325-326. To this end Congress has expressly confined the Courts of Appeal to the review of "final decisions of the district courts" (28 U.S.C. 1291), with certain specific exceptions, not including the order denying transfer which was reviewed on mandamus here (28 U.S.C. 1292). This Court has repeatedly rejected efforts to fritter away this basic policy through the use of writs of mandamus: "Least of all, can

a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause: for, as observed by Chief Justice Marshall, to do this 'would be a plain evasion of the provision of the act of Congress that final judgments only should be brought before this court for reexamination;' * * * and 'would subvert our whole system of jurisprudence.'" *American Construction Co.* v. *Jacksonville, Tampa & Key West Ry. Co.*, 148 U.S. 372, 379. *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 383; *Roche* v. *Evaporated Milk Assn.*, 319 U.S. 21, 30-31; *In Re Wagner*, 249 U.S. 465, 471; *Ex Parte Newman*, 14 Wall. 152, 165-166, 169.

Even assuming[10] that the Courts of Appeal possess a power comparable to that of this Court, to expedite the review of interlocutory decisions in proper cases in the exercise of a general appellate supervision of inferior federal courts, the use of the extraordinary writs for this purpose is confined to truly exceptional cases.[11] There is nothing exceptional about the present case; and nothing to the contrary was suggested below. The asserted power to issue the writ was based upon the inadequacy of ultimate appeal from orders denying transfers under Section 1404 (a) *as a class*. If the decision below stands, every lower court ruling on a motion of this class will be reviewable on a petition for the extraordinary writ. That review will examine the record for errors of law, or "abuse of discretion" in judgments of fact—precisely the scope of review if the order were directly appealable by statute. The effect is precisely as if Section 1292 were amended to add orders denying transfer to the listed classes of interlocutory orders which are subject to direct appeal.

If, as the court below held, the absence of an effective appeal were itself enough to justify use of the writ, the rule of finality expressed in Section 1291 would be meaningless. Lack of an effective appeal is a prerequisite to the

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[10] Cf. *In Re Josephson*, 218 F. (2d) 174, 177-180 (C.A. 1).

[11] *Ex Parte Peru*, 318 U.S. 578, 584-587.

issuance of the extraordinary writs, but it is not a reason for their use. If this were not true the statutory prohibition of piecemeal appeals would create the basis for the very interlocutory review which it was the purpose of the statute to prevent. "Mandamus will not lie, it is true, when the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error." *Ex Parte Newman*, 14 Wall. 152. The inconvenience and expense that a litigant may suffer as a result of delay in appellate review until final judgment will not justify interlocutory review by mandamus (*Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 383-384; *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 30-31), and this is true even though subsequent proceedings may make ultimate review ineffective and though the interlocutory order results in additional costs which the complaining litigant can never recover. *In Re Wagner*, 249 U. S. 465, 471. The injury that a litigant may suffer from the denial of interlocutory review does not arise from a usurpation of judicial power or a refusal to exercise it which a writ of mandamus could correct; it results from the statutory prohibition against interlocutory appeals based upon a legislative decision that this harm is less, overall, than that which results from the delay and expense of repeated journeys through the appellate process.

The ruling below not only subverts the statutory and judicial policy against interlocutory reviews, but threatens the usefulness of Section 1404 (a) itself. Judge Goodrich, speaking for an *en banc* court including Judge Maris who served as Chairman of Judicial Conference Committee on the revision of the Judicial Code, has pointed out:[12]

> The second danger which threatens the usefulness of Section 1404 (a) comes from the appellate courts. It is settled in this Circuit and elsewhere that an order

[12] *All States Freight* v. *Modarelli*, 196 F. (2d) 1010, 1011-1012 (C.A. 3).

either making a transfer or refusing a transfer is not appealable. Now the effort is being made both in this court and elsewhere to substitute for appeal a review by mandamus whenever the losing party on a motion to transfer wants an advance review of the ruling on this point.

We think that this practice will defeat the object of the statute. Instead of making the business of the courts easier, quicker and less expensive, we now have the merits of the litigation postponed while appellate courts review the question where a case may be tried.

Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus.

The ruling below is in conflict with the decisions of this Court defining the permissible uses of a writ of mandamus. This Court has repeatedly held that the writ will issue only to confine an inferior court to its lawful jurisdiction, or to require a lower court to exercise its proper authority when it declines to do so. Where, as in the present case, the district court has neither exceeded its jurisdiction nor declined to exercise it, mandamus will not lie to provide a piecemeal review of the lower court's interlocutory action, and this is true though its decision may have been in error either in law or in fact. *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 382-383, *Roche* v. *Evaporated Milk Association*, 319 U.S. 21, 25-26. Prior holdings of this Court thus required the denial of the first petition for mandamus in the present case as well as the second, for even if Judge Igoe's initial order involved an error of law, which we do not concede,[13] it was an error committed

[13] The record discloses that Judge Igoe gave weight to the relative availability of speedy transportation and that his statement relating to the removal of the case from a state to a Federal court was merely a passing observation. (App.).

in the exercise of admitted jurisdiction over both the parties and the subject matter. If interlocutory review of such alleged errors is to be had, it should come by way of legislative change in the statutory prohibition against interlocutory review; and not by the use of the extraordinary writs.

Section 1404 (a) provides that the district court "may" transfer a cause under the circumstances stipulated in the statute. This Court has recently held that the discretion thus vested in the district court is broader than that exercised in determining a motion based on the doctrine of forum non conveniens. *Norwood* v. *Kirkpatrick*, No. 337, October Term, 1954, decided April 11, 1955, 99 L. Ed. 461, 463. On the second petition for mandamus in the present case, the court below reviewed the factual judgment arrived at by Judge Igoe and the action taken by him in the exercise of this broad discretion, and issued a writ directing that he vacate his order denying transfer, and enter an order transferring the action. This decision of the court below is in conflict with the repeated rulings of this Court that a judicial act performed in the exercise of a court's discretion will not be reviewed on petition for mandamus, and that the writ will never issue directing the manner in which a court should exercise the judicial discretion vested in it. Mandamus cannot be used, as it was in the instant case, "to compel adjudication in a particular way." *Interstate Commerce Commission* v. *United States*, 289 U.S. 385, 394. *Ex Parte Newman*, 14 Wall. 152, 165-166; *In Re Pollitz*, 206 U.S. 323, 331. For an appellate court to intervene by writ of mandamus in these circumstances is simply to usurp the function of the district court and exercise the discretion vested in it by the statute. "The office of a writ of mandamus would be enlarged to actually control the decision of the trial court rather than used in its traditional function of confining a court to its prescribed jurisdiction." *Bankers Life & Casualty Company* v. *Holland*, 346 U.S. 379, 383. The Court of Appeals, on the second petition,

usurped the function of the district court, an action which it had previously said it would not take. (App. 24a)

If an "abuse of discretion" were ever reviewable on writ of mandamus,[14] the standards applied by the court below in making this review in the present case would be improper. The court below undertook to "balance" the various factors bearing upon the propriety of transfer, giving "paramount" consideration to the "interests of justice," and "minimal value" to plaintiff's right to select her forum, and issued the writ on the basis of its conclusion that the denial of the motion to transfer was an "abuse of discretion" defined as a "clearly erroneous" factual judgment. There is no basis in the statute for the assignment of paramount weight to the "interest of justice" factor; and the assignment of "minimal value" to plaintiff's choice of forum is contrary to the decisions of this Court.[15] Most important, however, mandamus cannot, consistently with the decisions of this Court, be issued simply because the appellate court concludes that the district court's judgment on conflicting facts was "clearly erroneous." These words are customarily taken to mean no more than that the reviewing court "is left with the definite and firm conviction that a mistake has been committed." *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 339. Review on mandamus based upon such a standard is inconsistent with the principles governing this writ discussed above, as well as with the intention of this statute to vest

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[14] This Court has stated in dicta that a writ of mandamus might issue where there was a clear abuse of discretion by the court below, (*Bankers Life & Casualty* v. *Holland*, 346 U.S. 379, 383) but, as demonstrated in the body, the actual holdings of this Court have been consistently to the contrary.

[15] *Norwood* v. *Kirkpatrick*, No. 337, October Term 1954, decided April 11, 1955, 99 L. ed. 461, may have diminished the weight required to be given plaintiffs' selection under the decisions in *Gulf Oil Corporation* v. *Gilbert*, 330 U.S. 501, 508, and *Koster* v. *Lumberman's Mutual Casualty Company*, 330 U.S. 518, 524, but it has not reduced it to a "minimal" consideration. See page 463, of 99 L. Ed.

a broad discretion in the district court. *Norwood* v. *Kirkpatrick*, No. 337, October Term 1954, decided April 11, 1955, 99 L. ed. 461. In the present case, there was a direct and substantial conflict of fact as to whether trial in one or the other of the competing jurisdictions would best serve the convenience of witnesses and parties and the interests of justice. It is impossible to read this record without concluding that the line between an "erroneous" decision and what the court below thought to be a "clearly erroneous" one, is insufficient to prevent a Court of Appeals from simply substituting its judgment and discretion for that of the district court.

CONCLUSION

It is respectfully submitted that because of the importance of the question, and the existing conflicts among the circuits and with the prior decisions of this Court, this petition for a writ of certiorari should be granted.

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